JD–29-10
Brooklyn, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ONE STOP KOSHER SUPERMARKET, INC.

and Case 29-CA-29865

LOCAL 338, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, UNITED FOOD AND COMMERCIAL WORKERS

James P. Kearns, Esq.,
for the General Counsel
Jeffery A. Meyer, Esq. (Kaufman, Dolowich, Voluck & Gonzo LLP),
for the Respondent
Jae W. Chun, Esq. (Friedman & Wolf),
for the Charging Party

DECISION

Statement of the Case

JEFFREY D. WEDEKIND, Administrative Law Judge. The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain or provide requested information after its labor consultant, David Ganz, executed a voluntary recognition agreement with the Union in May 2009. Respondent denies the commission of any unfair labor practices, asserting, among other things, that Ganz lacked authority to execute the recognition agreement.

The underlying charge was filed by the Union on October 20, 2009. The Union subsequently filed an amended charge on January 25, 2010, and the General Counsel issued the complaint the following day. Respondent thereafter filed its answer and amended answer denying the substantive allegations on February 9 and March 22, 2010, respectively.

Following two prehearing conferences, the case was tried before me in Brooklyn, New York, on March 23 and 24, 2010. The General Counsel and the Respondent thereafter submitted post-hearing briefs. After considering the parties' briefs and the entire record,[1] including my observation of the demeanor of the

[1] There are numerous errors in the transcript of the hearing testimony, but the following warrant special mention: on page 14, lines 8-9, "withdrew its recognition" should read "withdrew its *petition*"; on page 43, line 11, "call and RN petition" should read "*file an RM* petition"; on page 44, line 25, "is required" should read "is *not* required"; on page 47, line 16, "19(b)'d" should read "10(b)'d"; on page 70, line 10, "is a well person" should read "is *not* a well person"; and on page 75, lines 9 and 11, "hedgeman number two" should read "Hitler number two". On April 26, 2010, I issued a Notice to Show Cause to all parties why these corrections should not be made**.** No opposition has been received.

witnesses,[2] I make the following

Findings of Fact

I. Jurisdiction

Respondent is a domestic corporation engaged in the operation of a retail grocery store. Its principal office and place of business is located at 98 Rutledge Street, Brooklyn, NY. Respondent admits in its amended answer, and I find, that, in conducting its business operations, it annually derives gross revenues in excess of $500,000, and purchases and receives goods and materials in excess of $5000 directly from suppliers located outside the State of New York, and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

On December 29, 2008, the Union filed a petition for an election seeking certification as representative of Respondent's clerks and delivery workers (Case 29-RC-11704). After receiving the petition, Respondent's president, David Menczer, retained David Ganz to represent the company. Ganz operates the Tri-State Commercial Association, an association that represents employers in labor relations. Tr. at 63, 72, and 83.

1. Ganz files Notice of Appearance in representation case

Thereafter, on January 5, 2009, Ganz submitted a formal Notice of Appearance as Respondent's representative in the case. In that capacity, the same day he also executed a commerce questionnaire for the Respondent. The questionnaire indicated, among other things, that the Respondent was a member of, or participated in, the Tri-State Commercial Association.

2. Ganz executes Stipulated Election Agreement

Over the next few days, the Union's counsel, Jae Chun, had several telephone conversations with Ganz regarding the time and place for the election. Tr. at 18. Eventually, an agreement was reached, and on January 8, 2009, Ganz and Chun

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[2] Only three witnesses testified: the Charging Party Union's counsel, Jae Chun; the Respondent's president, Joseph (David) Menczer; and Ganz. To the extent there are conflicts in the testimony regarding the relevant facts, I have credited Chun over Menczer and Ganz. Unlike the latter two witnesses, Chun appeared to answer all questions forthrightly and honestly, without any prevarication or evasion, and his testimony was consistent with the documentary and other undisputed evidence. Although Chun was both the Charging Party's counsel of record and the General Counsel's witness in this proceeding, I find that this is neither disqualifying nor sufficient reason by itself to discount his testimony, particularly when weighed against the unsupported and implausible testimony by Menczer and Ganz. See generally *Operating Engineers Local 9 (Fountain Sand & Gravel Co.)*, 210 NLRB 129 fn. 1(1974).

executed a Stipulated Election Agreement on behalf of the Respondent and the Union, respectively, which the Regional Director approved the same day. GC Exhs. 2 and 3; and Tr. at 18 and 84.

Pursuant to the stipulation, the election was originally scheduled for January 26, 2009. However, on January 22, the Regional Office postponed the election indefinitely at the Union's request pending Respondent's submission of an accurate voter eligibility list and the outcome of unfair labor practice charges the Union had filed against Respondent (Cases 29-CA-29423 and -29368). See GC Exh. 5; and Tr. at 20.

3. Ganz responds to Union's ULP charge against Respondent

Ganz also represented Respondent with respect to the Union's unfair labor practice charges. Tr. at 63 and 84. By letter dated February 4, 2009, Ganz formally responded to the NLRB Regional Office "on behalf of [Respondent]" regarding the issues raised by the charge in Case 29-CA-29368. The letter disputed the allegations and requested that the charge be dismissed. GC Exh. 4; and Tr. at 84 and 93. During this period, Chun and Ganz also spoke directly on at least one occasion regarding the Union's unfair labor practice charges against Respondent. Tr. at 20.

4. Ganz executes voluntary recognition agreement with Union

Thereafter, in May 2009, Ganz called Chun to discuss ways to resolve the unfair labor practice charges. During this conversation, Ganz indicated that, based on the number of cards that the Union had submitted to the Board, Respondent was willing to recognize the Union. Tr. at 21 and 35. Accordingly, Chun drafted a "Recognition Agreement," which Ganz and Kevin Lynch, the Union's director of organizing, subsequently signed on May 27, 2009.[3] The agreement provided as follows:

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[3] The foregoing facts are based on Chun's testimony. Although Ganz testified to a different version of the events, I discredit his testimony. According to Ganz, the conversation occurred with Lynch, during a meeting at a local restaurant about another kosher supermarket in Brooklyn that he represented (Hatzlacha), rather than with Chun on the phone. (Indeed, Ganz testified that he *never* had a conversation with Chun about the Respondent; that *all* such conversations were with Lynch.) Ganz testified that he complained to Lynch during the meeting about a subpoena that had been served between Passover and Shvouth, which requested a long list of information. (The record is unclear whether the subpoena had been served on Respondent or Hatzlacha, or what information it sought. Compare Tr. at 74-75 and 101, with Tr. at 84-85.) Specifically, he told Lynch

> "Why do you torture your victim? We can go through it peacefully and have a discussion of an election, and have a negotiation with [a] contract, which I do [for] many, many companies. Why did we have to have this belligerent movement, fighting back and forth every time? . . . You're asking for something which the Company can't give, and eventually there's going to be problems . . . . And you're the one who brings them out to such a position. . . . You're dealing here with a Company where all are Jewish people [and are] on holiday. Why do you torture them? [Do] you want to be Hitler number two?"

According to Ganz, Lynch responded that he did not want to be "Hitler number two," but that he could not pull the subpoena back because there were

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WHEREAS, Local 338, RWDSU/UFCW ("Local 338") has requested recognition as the exclusive collective bargaining representative of all full-time and regular part-time clerks and delivery persons employed by One Stop Kosher Supermarket ("One Stop") at 98 Rutledge St., Brooklyn, New York 11211.

NOW THEREFORE, the parties hereto agree that:

One Stop, having determined that authorization cards were executed by a majority of its employees employed in its store and unit described above designating Local 338 as the exclusive collective bargaining representative of said employees, and being satisfied that Local 338 represents an uncoerced majority of said employees, hereby recognizes Local 338 as the exclusive collective bargaining representative of said employees.

ONE STOP KOSHER SUPERMARKET	LOCAL 338, UFCW
By: [David Ganz]	By: [Kevin P. Lynch]

GC Exh. 7. The same day, the Union filed a request with the Region to withdraw its previous election petition, which the Regional Director granted. GC Exh. 5.

5. The Union requests Respondent to bargain and provide information

Chun next saw Ganz a week later, at a meeting regarding Hatzlacha Supermarket, another kosher supermarket in Brooklyn where the Union had recently been certified as the collective-bargaining representative of the employees. During the

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"only 2 days before the hearing." Lynch therefore proposed that Ganz sign the recognition agreement with the Union so that he would have "a reason to pull back the trial and subpoena." Ganz immediately agreed, shook his hand, and signed the agreement. Tr. at 74-75, 84-87, 90-94, and 98.

As indicated in Respondent's post-hearing brief, Ganz' foregoing testimony is "uncontroverted" (Br. at 4), in the sense that neither the General Counsel nor the Charging Party called Lynch to rebut Ganz' testimony. However, while Ganz' testimony was uncontroverted by Lynch, it was clearly inconsistent both with Chun's prior testimony and with the supporting documentary evidence that the General Counsel had previously introduced, without objection, which indicated that Ganz mailed his signed copy of the agreement to Chun (Exh. 7, p. 2; and Tr. at 21-22). Further, as discussed infra, there were also substantial other grounds to question Ganz' credibility. Thus, under all the circumstances, there was no real need for the General Counsel or Charging Party to prolong the trial by calling Lynch as a witness. Cf. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (no adverse inference was warranted by respondent's failure to call its manager, as the circumstances indicated that the manager was not called because his testimony was unnecessary, not because it would have been adverse).

meeting, Chun told Ganz that the Union was ready to start bargaining with Respondent. Ganz replied, "Lets take one thing at a time," which Chun understood to mean that Ganz wanted to wait to see if an agreement could first be completed with Hatzlacha. Chun agreed, on the assumption (unstated) that the Union could then get a "me too" agreement with Respondent. Tr. at 22-24, and 37.

Over the next few months, Chun and Ganz continued to meet to discuss Hatzlacha. During those meetings, Chun mentioned to Ganz on a couple of occasions, "If we don't get this thing done, then we're going to have to start One Stop Kosher." Ganz replied, "Okay, sure, sure," but did not commit to any specific date to begin negotiations. Tr. at 25.[4]

Eventually, Hatzlacha declared an impasse in its negotiations with the Union. Shortly thereafter, on September 11, 2009, Lynch sent a letter to Respondent's manager, Moshe Lieber, with a copy to Ganz, formally requesting "bargaining unit information for the purpose of negotiating a collective bargaining agreement and formulating wage and benefit proposals and to fulfill our duties as bargaining representative." Specifically, the letter requested:

> 1) Names, Job Titles, Dates of Hire and wage history for each employee, including wage rate as of one (1) year ago and as of two (2) years ago, and status (regularly scheduled hours per week and hours per day).
>
> 2) Wage data including: average bargaining unit wage by classification; starting rate for all classifications; pay scales and amounts of raises uniformly granted.
>
> 3) A copy of all job descriptions, copies of recent job postings; past practice policies on transfers of position, shift or unit; and sample of recent work schedules.
>
> 4) Fringe Benefits: Copies and descriptions of any benefit programs currently provided to employees, such as health insurance, stock purchase and pension plans, including copies of the booklets, employee handbooks, and the cost of each benefit to the company and to the employees.
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> For health insurance benefits:
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> The date the insurance plan, if any, will be re-negotiated with the insurance carrier (i.e. the anniversary date) and any proposed changes; the number of employees with health plan coverage and the number enrolled for dependent coverage.
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> For the Pension Plan:
>
> A summary of the agreement, actuarially reviewed, the number of retirees and the most recent form 5500 or 500(c).

[4] Contrary to Chun, Ganz testified that the parties' previous recognition agreement was not raised for the first time until September, after the Union and Hatzlacha had reached an impasse in negotiations. Tr. at 77-78. Again, however, I discredit Ganz' testimony in this respect.

> 5) Rules: Copies of personal (sic) hand book and copies of any other written rules or policies governing work and personal relations.

Finally, the letter requested that the Respondent call the Union's office "as soon as possible, and no later than September 30, 2009," to "arrange for the start of negotiations." GC Exh. 8. See also Tr. at 25-27, 76-77, and 85-86.

6. Ganz agrees to begin bargaining and provide information

Receiving no response to its letter, on October 20, 2009, the Union filed the instant 8(a)(5) charge. Approximately 2 months later, it received the following letter dated December 15, 2009, from Ganz (on Tri-State Commercial Association stationery):

> I apologize on behalf of the Employer for not responding to your letter date [sic] Sept. 11, 2009; I just received the letter from the Board for the first time.
>
> I was under the impression or rather misled to believe that the parties resolved this matter in May 2009. I thought everything was put to rest when the Union withdrew the charges at the Board.
>
> Unfortunately, for reasons unbeknownst to me the Union desires to reactivate this process and wishes to negotiate.
>
> I have no objection to meet [sic] the Union to negotiate and provide the information that we able [sic] to furnish. I am ready, willing, and able to meet the Union for negotiations. I am proposing the following dates: December 21, 22, & 23, 2009, in my office.
>
> Please advise me of the date and time you are available.

GC Exh. 9. See also Tr. at 27.

Chun responded to Ganz by letter dated December 18, 2009. Chun stated that the Union was unable to meet on the proposed dates in late December (which were just before the Christmas holiday), but would be available after January 5, 2010. He also again requested the information previously requested in Lynch's September 11 letter. GC Exh. 10. See also Tr. at 29.

About 10 days later, by letter dated December 28, 2009, Ganz provided some of the information the Union had requested, including employee names and addresses and wage rates as of January 2009, which he had received from Lieber's office that day. GC Exh. 11; and Tr. at 30 and 94-96.

7. Ganz withdraws as Respondent's representative

Ganz continued as Respondent's representative with respect to labor relations and the NLRB until January of the following year. Tr. at 85-86. At that time, by letter dated January 13, 2010, Ganz notified the Region that he was no longer representing Respondent. GC Exh. 6. After learning of this, on March 15, 2010, Chun sent a letter to Respondent's attorney, Jeffery Meyer, again requesting that Respondent commence bargaining and provide the remaining information that had not previously

been provided. GC Exh. 12. To date, however, no negotiations have occurred and the remaining information has not been provided.

B. Analysis

As indicated above, Respondent's primary argument throughout the proceeding has been that it is not bound by the recognition agreement because Ganz lacked the authority to execute it. During the trial and in its post-hearing brief, Respondent has also offered various other reasons why the agreement is not binding, including that it was "questionably procured" and was a "sham" agreement that was never meant to be given any force or effect, and that it was not "coupled with" any indicia of majority support. However, for the reasons set forth below, I find that Respondent's arguments lack merit and that it violated the Act as alleged by failing to bargain and provide information to the Union.

1. Whether Ganz had authority to execute the recognition agreement

Pursuant to Section 2(13) of the Act, the Board applies common law agency principles in determining whether an individual has acted as an agent of an employer.[5] Under those principles, an agency relationship may be found based on either actual authority (the employer's express or implied manifestation of authority to the individual), or apparent authority (the employer's manifestation of the individual's authority to a third party). See, e.g., *Toering Electric Co*., 351 NLRB 225, 236 (2007); and *Wal-Mart Stores,* 350 NLRB 879, 884 (2007). Moreover, even in the absence of actual or apparent authority, a principal may be bound by the actions of an agent as if originally authorized where the principal has subsequently "ratified" those actions by its silence and/or affirmative conduct. See *Service Employees Local 87 (West Bay Maintenance),* 291 NLRB 82, 83 (1988).

As the party asserting an agency relationship here, the General Counsel has the burden of proving its existence. See, e.g., *Tyson Fresh Meats, Inc*., 343 NLRB 1335, 1336 (2004); and *Pan-Oston Co*., 336 NLRB 305, 306 (2001). I find that this burden has been met. Specifically, in agreement with the General Counsel, I find that a preponderance of the evidence supports a conclusion that Ganz had both actual and apparent authority to execute the recognition agreement on behalf of Respondent. I further find that Respondent subsequently ratified Ganz' action.

a. Actual authority

There is no direct evidence that Respondent expressly authorized Ganz to sign the recognition agreement. On the contrary, Ganz specifically testified that no such express authority was given. Indeed, he testified that Respondent gave him a "mandate" not to sign an agreement without an election. Ganz testified that he signed the agreement "unilaterally, on my own, without authority from the Company," because he "thought [it was] invalid," and was just for the purpose of getting the Union to withdraw its charges from the Board. Tr. at 78-80, 82, 90-94, and 98.

[5] Section 2(13) of the Act provides: "In determining whether any person [acted] as an 'agent' . . ., the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

However, like other issues of fact, the existence of actual authority may proved by circumstantial as well as direct evidence. *Thunderbird Hotel*, 152 NLRB 1416, 1424 (1965). See also *Amusement Industry v. Stern*, -- F. Supp 2d --, 2010 WL 445906, slip op. at 10-12 (S.D. N.Y. March 1, 2010), and cases cited there. Here, for the following reasons, I find that Ganz' testimony is not credible, and that the overall circumstances support a reasonable inference that Respondent expressly or impliedly granted Ganz actual authority to sign the recognition agreement.

First, it is undisputed that Ganz was retained by Respondent to handle all matters related to the Union's representation petition; that he had authority to negotiate and execute the Stipulated Election Agreement on behalf of the Respondent; and that he also served as Respondent's representative with respect to the Union's related unfair labor practice charges. See Tr. at 60-63, 72, and 83-84. See also Tr. at 85-86 (admitting that he represented the Respondent "as far as labor relations and the NLRB . . . in general"). Ganz' execution of a recognition agreement with the Union in return for withdrawal of its charges was clearly related to this undisputed general authority.[6]

Second, it is also undisputed that Ganz did, in fact, sign the recognition agreement on the line reserved for the Respondent while still acting as Respondent's labor relations representative. GC Exh. 7; and Tr. at 79-80, 85-86, and 90-91. It is difficult to believe that Ganz -- who by his own testimony has been a labor consultant for over 30 years and had never signed a voluntary recognition agreement before (Tr. at 100) -- would have done so in this instance "unilaterally," without some manifestation from Menczer that he had such authority, particularly if, as he testified, Menczer had previously "mandated" him not to sign any agreements.

Third, Ganz' explanation for why he signed the recognition agreement unilaterally, in contravention of Menczer's purported mandate, makes no sense.[7] The Union's willingness to withdraw the election petition and related unfair labor practice charges in exchange for the agreement clearly indicates that the Union believed the recognition agreement was valid, not invalid. See *Richmond Toyota,* 287 NLRB 130,

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[6] The General Counsel's post-hearing brief argues that Ganz' execution of the recognition agreement was actually *within* the scope of his undisputed general authority, citing *Batavia Nursing Inn*, 275 NLRB 886, fn. 2 (1985)(attorney who served as employer's representative in both legal and non-legal matters relating to the election, including at preelection conferences and the counting of ballots, acted within the scope of his general authority when he assaulted union organizer on election day). See also *Wal-Mart Stores*, supra, 350 NLRB at 884; *Tyson Fresh Meats,* supra, 343 NLRB at 1336; *Mountaineer Steel, Inc*., 326 NLRB 787, 794 (1998); and *Contemporary Guidance Services*, 291 NLRB 50, 64 (1988). However, it is unnecessary to decide this issue given my conclusion that express or implied authority may otherwise reasonably be inferred from all the circumstances.

[7] An implausible, inconsistent, or unsupported explanation for an action may support an inference that the true motive or reason for the action is contrary. See *E.C. Waste, Inc. v. NLRB*, 359 F.3d 36, 43 (1st Cir. 2004); *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995); *Holo-Krome Co. v. NLRB*, 954 F.2d 108, 112-114 (2d Cir. 1992); *NLRB v. Dillon Stores*, 643 F.2d 687, 693 (10th Cir. 1981); and *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

132 (1987).[8] Further, as discussed above, even if true that Ganz harbored a contrary belief, it is highly unlikely that he would have signed the agreement without consulting his client, as the foreseeable and probable result of doing so would be more charges and litigation in the event Respondent refused to bargain (which is eventually what happened).

Fourth, Respondent's conduct was inconsistent with Ganz' testimony. Lieber was clearly aware that the Union was alleging the existence of a voluntary recognition agreement at least as of late October 2009, after the Union sent him its September 11 letter requesting bargaining and the NLRB Regional Office served him with a copy of the Union's new unfair labor practice charge (which specifically mentioned the voluntary recognition agreement). See GC Exhs. 1 and 8; and Tr. at 84. Ganz also admitted that he informed Menczer of the recognition agreement in late December. Nevertheless, at no time between September 2009 and January 13, 2010, when Ganz withdrew as representative, did Respondent disavow Ganz' actions or repudiate the agreement. On the contrary, Lieber's office provided Ganz with the employee and wage information that he enclosed with his December 28 letter to the Union. See GC Exh. 11 and Tr. at 94-96. There is no apparent reason why Respondent would have done so unless it believed that it had validly recognized, and was legally obligated to bargain with, the Union.[9]

Finally, Respondent has failed to turn over any of the documents subpoenaed by the General Counsel in this proceeding regarding the agency relationship between Respondent and Ganz. During a discussion of the subpoena on the first day of trial, Respondent's counsel advised that no documents had been disclosed to the General Counsel because, according to his client (Menczer), there were no documents responsive to the subpoena in his or the company's possession, not even any canceled checks to Ganz. Tr. at 8 - 11. However, when questioned at trial the following day, Menczer admitted that he had paid Ganz by check and that he had not even attempted to locate any of the canceled checks he had given to the company accountant. Tr. at 64 - 66. Ganz also admitted on the second day of trial that he had submitted bills to Respondent for his services. Tr. at 88.

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[8] At the end of the first day of trial, Respondent's counsel proffered that he would present "proof" that "[the agreement] was a sham . . . to get the International off the Union's back." Tr. at 45. A similar assertion is made in Respondent's post-hearing brief: that "the credible evidence presented at trial" indicates that the agreement was only "political cover" for the Union to cease its organizing efforts, and that "the Union [was] interested only in appeasing its International affiliate through the provision of statistical information (i.e., production of a purported recognition agreement)." Br. at 3-4. However, no specific testimony or other evidence supporting these assertions was ever presented. Indeed, Ganz' testimony (which, as indicated above, I have otherwise discredited) does not even mention the International Union.

[9] As manager, Lieber was responsible for taking care of the inside of the store, including independently hiring and firing employees, and writing most of the checks. Tr. at 62-63 and 67. See also GC Exh. 4. He therefore had at least apparent authority to recognize and bargain with the Union on behalf of the Respondent. See, e.g., *Richmond Toyota,* supra, 287 NLRB at 131.

Such documents are clearly responsive to the General Counsel's subpoena. See GC Exh. 13, paras. 2 and 4 - 6. Accordingly, I find that Respondent failed to comply with the subpoena, and that its failure to do so warrants an adverse inference that the undisclosed documents reflecting direct communications between Respondent and Ganz would lend additional evidentiary support to an inference or finding that Ganz had actual authority to execute the agreement. See generally *ADF, Inc*., 355 NLRB No. 14, slip op. at 6 (2010); *Paint America Services, Inc*., 353 NLRB No. 100, slip op. at 20 (2009); *Essex Valley Visiting Nurses Assn*., 352 NLRB 427, 440-443 (2008), and cases cited there. See also *Auto Workers v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972).[10]

b. Apparent authority

Even assuming, arguendo, that Ganz did not have actual authority to execute the recognition agreement, I find that he had apparent authority to do so. As indicated above, Respondent held Ganz out to the Union as its primary representative and conduit with respect to the Union's representation petition and unfair labor practice charges, and Ganz' execution of the recognition agreement was plainly related to that function. Further, Respondent did nothing to repudiate the recognition agreement; on the contrary, Respondent provided the Union with employee and wage information that it had requested in order to prepare for bargaining. Clearly, in these circumstances, the Union would reasonably believe that Ganz had the authority to execute the recognition agreement on behalf of Respondent. See generally *Dallas & Mavis Specialized Carrier Co*., 346 NLRB 253, 254 and 272 (2006); *Cooper Industries*, 328 NLRB 145 (1999); *Dentech Corp*. 294 NLRB 924, 926 (1989); and *Richmond Toyota*, supra.

c. Ratification

Finally, I find that Respondent's silence (failure to immediately disavow Ganz' execution of the recognition agreement after acquiring knowledge of it) and subsequent affirmative conduct (supplying the Union with requested information to begin bargaining) also constituted a "ratification" of Ganz' action equivalent to an original authorization. Thus, even if Ganz had neither actual nor apparent authority to execute the recognition agreement, Respondent has nevertheless become bound by it in the same manner and to the same extent as if Respondent had originally authorized it. See *Service Employees Local 87 (West Bay Maintenance),* supra, 291 NLRB at 83. See also *In re South African Apartheid Litigation*, 633 F.Supp.2d 117, 121-122 (S.D.N.Y. 2009); and 12 Williston on Contracts Sec. 35:22 (4th Ed. 2009).[11]

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[10] The Charging Party requested that I take such an adverse inference on the first day of trial. At that time, I reserved ruling on the request pending testimony from Menczer. Tr. at 11-12. Having reviewed Menczer's testimony, I grant the Charging Party's request for the reasons set forth above.

[11] The General Counsel's post-hearing brief does not specifically argue that agency is established pursuant to the doctrine of "ratification" as well as actual and apparent authority. However, the same facts are relevant to all three theories here and have been fully litigated. Accordingly, I find that it is appropriate to evaluate the agency issue under all three theories. See generally *AKAL Security,* 354 NLRB No. 11, slip op. at 5, fn. 8 (2009) (distinguishing cases reaching a contrary conclusion on the ground that they "involved a change in the theory of the violation that would have required litigation of a different set of facts, not just a change in the analytical framework").

2. Whether Respondent is bound by the recognition agreement

As noted above, Respondent also argues that the recognition agreement was "questionably procured," and was a "sham" agreement that was "never meant to be given any force or effect." Tr. at 42-45 and Br. at 3. This argument is apparently based on Ganz' testimony, described above, that he thought the agreement was "invalid," and his December 15, 2009 letter to the Union, which indicated that he had been "misled" to believe that "everything" would be "put to rest" when he signed the recognition agreement and the Union withdrew its charges.

However, there is no independent credible evidence supporting these vague and self-serving assertions. At trial, Respondent's counsel cited as support the Union's subsequent failure to file a voluntary recognition ("VR") petition with the Region, requesting that Respondent post a *Dana* notice to employees, i.e. an official notice advising employees of the voluntary recognition agreement and their right to file a decertification petition or to support a rival union petition.[12] Tr. at 42. This argument, however, is not repeated in Respondent's post-hearing brief. In any event, I reject it. Although the Union apparently did not file a formal VR petition with the Region (the General Counsel stipulated at the hearing that no *Dana* notice has been posted), the Union notified the Region of the recognition agreement when it requested withdrawal of its representation ("RC") petition. See GC Exh. 5. Further, as noted by the General Counsel, there is no requirement that a *Dana* notice be posted.[13]

Accordingly, even assuming arguendo that parole evidence is admissible to prove that an otherwise unambiguous recognition agreement was fraudulently obtained or a "sham," I find that Respondent has failed to prove that defense here. See *Sheehy Enterprizes, Inc*., 353 NLRB No. 84 (2009), enfd. – F.3d –, 2010 WL 1541280 (7th Cir., April 20, 2010); and *Horizon Group of New England*, 347 NLRB 795 (2006) (to establish "fraud in the execution" defense, employer must show that it relied on misrepresentations by the union; that it did not know the character or essential terms of the agreement; and that it did not have a reasonable opportunity to obtain such knowledge).

As indicated above, Respondent's post-trial brief also argues that the agreement should not be given effect because it was "coupled with no indicia of majority status." Br. at 3. This argument appears to be based on the testimony of both Ganz and Menczer that the Union never verified its majority status by showing them its cards. Tr. at 61 and 73. However, the recognition agreement stated on its face that Respondent had "determined that authorization cards were executed by a majority of its employees" in the unit, and was "satisfied that [the Union] represents an uncoerced majority of said employees." GC Exh. 7.

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[12] See *Dana Corp*., 351 NLRB 434 (2007). See also Office of General Counsel, Division of Operations Management, Memorandum OM 08-07 (Oct. 22, 2007) (discussing Regional Office procedures for implementing *Dana Corp.*).

[13] *Dana Corp*. addressed only the circumstances whereby a voluntary recognition agreement, and any contract executed thereafter, will bar a decertification or rival union petition. The Board majority specifically stated that it was not addressing the "circumstances in which employers may . . . unilaterally withdraw recognition from a union." 351 NLRB at 436-437.

In any event, even if Respondent had not, in fact, done what the signed agreement said it did, this would not change the result. As noted by the General Counsel, there is no requirement under extant Board law that a union show the employer proof of its majority status unless the employer requests to see the evidence, i.e. an employer may lawfully recognize a union as the exclusive Section 9(a) representative based solely on the union's unverified claim of majority status. See, e.g. *Moise & Son Trucking*, 197 NLRB 198 (1972). Further, while an employer in such circumstances may subsequently challenge the union's 9(a) status, it may not unilaterally terminate its bargaining obligation absent an affirmative showing that the union lacked majority support at the time of recognition (if the issue is raised within 6 months thereof), or that it currently lacks majority support. See *Staunton Fuel & Material*, 335 NLRB 717, 719, fn. 10 (2001); and *Oklahoma Installation Company*, 325 NLRB 741, 742 (1998), enf. denied on other grounds 219 F.3d 1160 (10th Cir. 2000), and cases cited there. Here, no affirmative evidence has been presented that the Union lacked majority status at the time of recognition in May 2009, when the instant charge was filed in October 2009, or thereafter through the date of the hearing.

3. Whether Respondent unlawfully failed to bargain and provide information

Having found that Respondent voluntarily recognized the Union, and that it is bound by its recognition agreement, I further find that it violated Section 8(a)(5) of the Act by failing to meet and bargain with the Union on request.[14] Although Respondent's answers deny that the unit is appropriate (GC Exh. 1), Respondent previously stipulated in the representation proceeding that the petitioned-for unit of clerks and delivery persons is appropriate (GC Exh. 3). Further, Respondent has offered no argument in this proceeding as to why the unit is not appropriate. In any event, having voluntarily recognized the Union as the exclusive representative of the agreed-upon unit, Respondent is now estopped from challenging the appropriateness of that unit. See *Strand Theatre of Shreveport Corp*., 346 NLRB 523, 536 (2006), enfd. 493 F.3d 515 (5th Cir. 2007); and *Red Coats*, 328 NLRB 205 (1999).

I also find that Respondent failed to timely provide the Union with all of the information it requested in its September 11, 2009 letter. As indicated above, Respondent provided only some of the information requested by the Union. Further, the remaining information clearly relates to wages, hours, and other terms and conditions of the unit employees, and is therefore presumptively relevant. Finally, although Respondent denied in its answers that the information is relevant and necessary, it has not presented any evidence or argument to rebut the presumption. Indeed, Respondent's counsel conceded at the hearing that the information requested is "generally relevant". Tr. at 26. Accordingly, Respondent's failure to timely provide all of

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[14] The exact date that this violation began is not entirely clear from the record. Both the complaint and the General Counsel's post-hearing brief allege that Respondent has refused to bargain since June 2009. However, as discussed above, Chun appeared to agree with Ganz' initial proposal in early June to delay the start of the One Stop negotiations pending further negotiations over the Hatzlacha agreement. Nevertheless, Chun continued to raise the issue informally thereafter, and the Union eventually sent a formal letter requesting bargaining in September, which failed to receive a timely response. Thus, I find that Respondent has unlawfully failed and refused to bargain since at least September 2009.

the requested information to the Union violated Section 8(a)(5). See, e.g. *TEG/LVI Environmental Services, Inc*., 328 NLRB 483 (1999).

Conclusions of Law

1. By failing and refusing to meet and bargain with the Union as the recognized exclusive collective-bargaining representative of the appropriate unit, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1), and Section 2(6) and (7) of the Act.

2. By failing and refusing to furnish the Union with relevant and necessary information it requested in its September 11, 2009 letter, Respondent has also engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) (and (1), and Section 2(6) and (7) of the Act.

Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that Respondent unlawfully failed and refused to bargain in good faith with the Union pursuant to its voluntary recognition agreement, I shall order Respondent to do so consistent with its rights and obligations under the Act. See, e.g., *Alpha Associates*, 344 NLRB 782 (2005); and *Red Coats*, supra. In addition, having found that Respondent failed and refused to provide the Union with all of the relevant and necessary information it requested on September 11, 2009 to prepare for bargaining, I shall order it to provide the information to the Union. See, e.g., *TEG/LVI Environmental Services,* supra. Finally, I shall require Respondent to post the standard notice at its facility advising the employees of this decision and order.[15]

Accordingly, on the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The Respondent, One Stop Kosher Supermarket, Brooklyn, New York, its officers, agents, successors, and assigns, shall

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[15] The complaint requests that Respondent be specifically required to post the notice "via its internet, by email, or other electronic procedures." GC Exh. 1. However, I lack the authority under extant Board law to specifically order this remedy in the absence of any record evidence that Respondent customarily disseminates notices to its employees electronically. See *Valley Hospital Medical Center, Inc*., 351 NLRB 1250, fn. 1 (2007). The request is therefore denied.

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Refusing to bargain with Local 338, Retail, Wholesale and Department Store Union, United Food and Commercial Workers (the Union) as the recognized exclusive collective-bargaining representative of employees in the following appropriate unit:

> All full-time and regular part-time clerks and delivery persons employed by Respondent at its 98 Rutledge St., Brooklyn, New York facility, excluding cashiers, clericals, managers, guards and supervisors as defined in Section 2(11) of the Act.

(b) Refusing to provide information to the Union that is relevant and necessary to the performance of its duties as the exclusive collective-bargaining representative of the unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Provide the Union with all of the information that it requested in its September 11, 2009 letter.

(c) Within 14 days after service by the Region, post at its facility in Brooklyn, New York, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 2009.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., May 7, 2010

Jeffrey D. Wedekind
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain with Local 338, Retail, Wholesale and Department Store Union, United Food and Commercial Workers (the Union) as the recognized exclusive collective-bargaining representative of employees in the following appropriate unit:

All full-time and regular part-time clerks and delivery persons employed by us at our 98 Rutledge St., Brooklyn, New York facility, excluding cashiers, clericals, managers, guards and supervisors as defined in Section 2(11) of the Act.

WE WILL NOT refuse to provide information to the Union that is relevant and necessary to the performance of its duties as the exclusive collective-bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for the unit employees.

WE WILL provide the Union with all of the information that it requested in its September 11, 2009 letter, which is relevant and necessary for the Union to prepare for bargaining.

One Stop Kosher Supermarket, Inc.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your

rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

One MetroTech Center (North), Jay Street and Myrtle Avenue, 10th Floor

Brooklyn, New York 11201-4201

Hours: 9 a.m. to 5:30 p.m.

718-330-7713.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.